Testimony for the
Maryland Commission on Capital Punishment

September 22, 2008

The American Civil Liberties Union has long called for the abolition of the death penalty. As many other witnesses have echoed, it is inhumane; it is arbitrarily imposed with disturbing racial disparities that no amount of reform has eliminated; the risk of executing the innocent is unacceptable; it has no demonstrated deterrent value; and it prolongs and sensationalizes the suffering of victim's families.

We are 35 years into our latest attempt to legislate a reliable, nondiscriminatory, and fair capital punishment system; that attempt has failed, nationwide and in Maryland. In the words of Justice Blackmun a decade ago:

> ". . .despite the effort of the States and the courts to devise legal formulas and procedural rules. . .the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. . . Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing."

Callins v. Collins, 510-U.S. 1141, 1143-44 (1994) (Blackmun, J., *dissenting*).

> "The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent and reliable sentences of death required by the Constitution."

Id. at 1145-46.

Justice Blackmun's decision came after watching the United States Supreme Court acknowledge that race is a determinative factor in whether someone lives or dies under our current system and yet uphold executions likely based solely on race. "Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die." *Id.* at 1153. As this Commission has learned, Maryland is no different, even after 15 more years of legislative refinements and

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reforms. Although the overwhelming majority of homicide victims in Maryland are African American – annually around 80% -- 100% of the victims of those on Maryland's death row are white. Maryland's death row is 67% African-American, yet African-Americans make up 28% of Maryland's total population. Maryland has the third highest percentage of African-Americans on death row, behind only the US Military and the Federal government.

Justice Blackmun's decision on capital punishment came after watching the United States Supreme Court refuse an evidentiary hearing to a condemned man with evidence of actual innocence. "[The Court" prefers 'finality in death sentences to reliable determinations of a capital defendant's guilt." *Id.* at 1158. As the Commission has heard, the nation's first DNA-based exoneration was in Maryland. Fellow Commission member Kirk Bloodsworth was convicted and sentenced to death for rape and murder in 1985. Eight years later, DNA evidence proved his innocence and he was released; despite having his death sentence upheld by the courts. Five people have been executed in Maryland since 1978. Since 1973, there have been 1119 executions and 129 exonerations of innocent people from death row nationwide. For every 8.7 executions there has been one exoneration. Such an error rate indicates that there is an unacceptably high risk in Maryland of executing an innocent person.

Justice Blackmun called these holdings "coddled delusions." "It is self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."

The Commission will make its own, independent determination about what principles must guide its determination about Maryland's death penalty. Of paramount importance, should be the reliability of the system and the fairness of the process. If the system cannot assure us of reliable verdicts, we cannot maintain it and claim to value the dignity of the individual or the fundamental justice of our society. The Commission has heard ample evidence to conclude that Maryland's capital punishment system is neither reliable nor fair. Despite 35 years of sincere attempts, it is simply not possible to eliminate the risk that an innocent person will be executed.

The issue of competent counsel is inextricably intertwined with the reliability of Maryland's capital punishment system. As you have heard in the case of Kirk Bloodsworth, a lawyer who is not prepared for the demands of a capital case jeopardizes the reliability of the outcome. Studies show that the primary source of error in capital cases is poor defense counsel; they show this for Maryland as well as across the country.

"Effective assistance of counsel"

One of the issues under consideration by this Commission is the question of the competence and quality of representation in death penalty cases. In the course of this

review, the Commission has heard some discussion of the legal standard known as "effective assistance of counsel" and the findings of courts in Maryland cases related to "effective assistance of counsel." There is a dangerous and misleading presumption underlying this discussion that will be the focus of this testimony.

It is important to understand what is not immediately obvious and what is profoundly counterintuitive about "effective assistance of counsel" and its counterpart phrase, "ineffective assistance of counsel." This phrase is a legal term of art. It has a highly technical, arcane meaning. It is not a measure of the quality of the lawyer, the competency of the defense, or the reliability of the death sentence and conviction. Instead, it is used first and foremost by courts to protect the finality of convictions and sentences. What a court means by "effective assistance of counsel" is not what comes to mind when one hears the phrase. It should not be what the members of this Commission mean when reviewing the quality of counsel in death penalty cases and when this Commission is considering the reliability of those trials when the competency of defense counsel is jeopardized. Why not? Courts uphold convictions resulting from trials where the defense lawyer slept during portions of the trial[1], and where defense counsel is drunk or taking illegal drugs through trial.[2] There is no ineffective assistance counsel as this term is used by the courts where the lawyer doesn't know the law; a defense lawyer in a capital case who does not know that the state's death penalty statute was declared unconstitutional three years earlier is not an ineffective lawyer under the legal standard known as "effective assistance of counsel."[3] This is the standard that governs in Maryland as it is the standard used nationwide. It should be obvious that this standard

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[1] *People v. Tippins*, 173 A.D.2d 512 (1991). Courts and case law are full of similar examples; they are discussed and compiled in numerous scholarly articles including Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L. J. 1835 (1994). James S. Leibman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 Fordham L. Rev. 1607, 1664 (2006).

[2] "Troubled" by defense counsel's decades long routine of drinking approximately 12 ounces of rum each evening; but denying ineffective assistance of counsel claim. *Frye v. Lee,* 235 F.2d 897, 907 (4th Cir. 2000). Counsel severely addicted to cocaine and alcohol and used both substances throughout trial; no ineffective assistance of counsel. *Gardner v. Dixon,* 1992 U.S. App. Lexis 28147, at 17-36 (4th Cir. October 21, 1992)(per curiam) (unpublished). "Proof of a defense counsel's use of narcotics during trial does not amount to a per se violation of constitutional right to effective counsel." (Counsel admitted using heroin and cocaine throughout the trial.) *People v. Badia*, 159 A.D.2d 577 (1990). "Murder defendant was not deprived of effective assistance of counsel, though counsel was alcoholic." (The court found that the performance of the court-appointed counsel in this capital case was not deficient, though he "consumed large amounts of alcohol each day of the trial...drank in the morning, during court recesses, and throughout the evening...was arrested for driving to the courthouse with a .27 blood-alcohol content," and ultimately died of alcohol-related diseases. Though the defendant's conviction was affirmed, his death sentence was overturned on other grounds. *People v. Garrison*, 155 A.D. 2d 553 (1989).

[3] Defense counsel did not know state's death penalty statute had been declared unconstitutional three years earlier; not ineffective assistance of counsel. *Frey v. Fulcomer*, 974 F.2d 348, 359 (3d Cir. 1992).

cannot assure the Commission that in Maryland capital convictions and sentences to death are reliable ones.

Certainly we are all committed to the principle that we must abandon a capital punishment system that cannot be fair and nondiscriminatory. The Commission will decide whether this kind of lawyering is fair or not.

Independent of fairness, we are also committed to the principle that we must abandon a capital punishment system that cannot be reliable. If we have a system that we know may execute an innocent person, we cannot maintain that system. The issue of quality of representation is as much about the reliability of the outcome of the capital trial as it is about a capital defendant's right to a fair trial. Because our capital punishment system relies on an adversarial process to generate reliable, accurate verdicts, a competent defense attorney is of paramount importance. It is the defense attorney who bears the responsibility for testing the reliability of the evidence: is the eyewitness testimony accurate; is the DNA test reliable. If the defense attorney is not competent, half of the equation is missing and the reliability of the verdict is in question.

As these examples illustrate, it will be very difficult and in most cases, impossible to question the reliability of the verdict in the courts. The United States Supreme Court has said that actual innocence is not relevant to the courts. This is the reality of the capital punishment system in Maryland—the legal standard of "effective assistance of counsel" does not protect the reliability of death sentences and it does not protect against the execution of innocent people. It is not intended to. Despite years of reforms - reformed guidelines for prosecutors and legislative reforms - the system is broken and it is right to conclude with Justice Blackmun that it cannot be fixed.

This is why evidence of error rates in capital cases is so disturbing and why the risk of executing the innocent is unacceptably high. Even with this kind of standard for effective assistance of counsel, capital cases have documented error rates of 70 percent. A comprehensive study by a team of Columbia University scholars concluded that America's death penalty system is "persistently and systematically fraught with error." *See* J. Liebman, S. Rifking, J. Fagan & V. West, *A Broken System: Error Rates in Capital Cases 1973-1995* (2000). Of the thousands of capital sentences reviewed in the study, courts have found serious, reversible error in nearly 70 percent. The most common errors prompting a reversal in state court after a death-penalty conviction are (1) incompetent defense lawyers who failed to seek or simply missed important evidence that the defendant was innocent; and (2) police or prosecutors who discovered evidence of innocence but suppressed it. This study includes evidence from Maryland with error rates for Maryland mirroring those nationwide.

This is the state of the death penalty law once you clear away the legal arcane in which it is wrapped. This Commission has heard both from some of Maryland's best prosecutors and capital defense lawyers about the issue of effective assistance of counsel. I hope that we all agree that our human dignity—I mean our humanity as a society—not

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only the humanity of an accused defendant—demands that we do not execute people because of their race (or the race of their victims); we do not value victims and victims' families more for their race or where they live; we do not sensationalize the suffering of victims and victims' families while failing to comfort it with real services; we do not execute the innocent nor do we force the innocent to undergo a trial for their lives; and we do not execute anyone summarily without a fair trial where credible evidence is fully tested beyond a reasonable doubt with the assistance of a competent lawyer.

If these are the principles that guide the Commission's review and recommendations, the conclusion must be that Maryland's capital punishment system should be abolished. We would be better served, and public safety better protected if our resources were directed to funding comprehensive services and assistance for murder victims' families; to improving correctional officer safety; and to providing law enforcement agencies and police officers the resources they need to keep communities safe and to conduct accurate investigations.

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